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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. for Cert., pp. 2a-7a) is reported

at 549 F.2d 950. The opinion of the United States District Court for the Middle District of North Carolina (Pet. for Cert., pp. 7a-12a) is reported at 69 F.R.D. 576, and unofficially at 13 F.E.P. Cas. 444.

JURISDICTION

This action was brought by respondent in the United States District Court for the Middle District of North Carolina, alleging age discrimination in employment, with jurisdiction based on 29 U.S.C. sec. 626 (b),(c); 29 U.S.C. sec. 216(b).

The district court's order striking respondent's demand for jury trial was entered on January 28, 1976. The district court certified this issue for interlocutory appeal, and the United States Court of Appeals for the Fourth Circuit agreed to entertain the appeal, as provided in 28 U.S.C. sec. 1292(b); and Federal Rules of Appellate Procedure, Rule 5.

The opinion of the court of appeals was filed on February 2, 1977, vacating the order of the district court and remanding the case for further proceedings. Petitioner filed a petition for writ of certiorari on March 31, 1977, and on June 27, 1977, this court granted the petition. The jurisdiction of this Court is conferred by 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act or the Seventh Amendment requires a jury trial upon demand in an action for damages and injunctive relief under that Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 626:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215

of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the

Secretary to enforce the right of such employee under this chapter.

Fair Labor Standards Act. 29 U.S.C. sec. 216(b):

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing

of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

STATEMENT OF THE CASE

Respondent was discharged from her position of financial services coordinator by petitioner on January 31, 1975, when she was 48 years of age. (A.3). Respondent commenced a civil action against petitioner, alleging that her discharge was an act of discrimination on the basis of her age, and that it violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 623(a)(1). Respondent's prayer for relief proposed an injunction requiring her reinstatement, and to "[a]ward plaintiff monetary damages consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages."[1] In the

1 The Appendix, p.4, erroneously includes the word "attorney" after the word "plaintiff" and before the word "monetary".

complaint respondent demanded trial by jury. (A. 4-5).

Petitioner filed a motion to strike respondent's jury trial demand. (A.9). Following briefing and argument, the district court ordered that respondent's demand for jury trial be stricken. (Pet. for Cert., p. 7a-12a).

An interlocutory appeal on this issue was certified by the district court, and was allowed by the court of appeals.

While the appeal was pending in the court of appeals, respondent filed a motion in that court seeking leave to amend her complaint, by adding paragraphs alleging that petitioner acted purposely, intentionally, willfully, wantonly, oppressively, and with a reckless disregard of respondent's rights; alleging damages in addition to loss of wages, consisting of depression and anxiety, humiliation and embarrassment. The motion also sought to substitute for the part of the prayer for relief quoted above which seeks damages, the following:

> Award plaintiff monetary damages consisting of lost wages and all her other actual damages, statutory liquidated damages, and common law punitive damages. (A. 11-12).

A unanimous panel of the court of appeals reversed the district court. In the opinion written for himself and Circuit Judge Russell, Senior Circuit Judge Bryan expressed the opinion that respondent is entitled to trial by jury in this case by virtue of both the Seventh Amendment and the Age Discrimination Act itself. Circuit Judge Butzner stated in his concurring opinion that because the Age Discrimination Act confers on respondent the right to trial by jury, it is unnecessary to consider the effect of the Seventh Amendment. Respondent's motion for leave to amend the complaint was remanded for presentation to the district court. (Pet. for Cert., pp. 2a-7a).[2]

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2 Other cases holding in favor of and against the right of jury trial in Age Discrimination in Employment Act cases are cited in Notes 3 and 2, respectively, of Petitioner's Brief, pp. 4,6.

SUMMARY OF THE ARGUMENT

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF ESTABLISHES THE RIGHTS OF LITIGANTS TO TRY THEIR CASES BY JURY.

A. On its face the Age Discrimination in Employment Act provides for legal relief.

In this action respondent seeks lost wages, statutory liquidated damages, common law actual damages, and punitive damages. The Age Discrimination in Lmployment Act provides for "such legal or equitable relief" as may be appropriate.

The claim for lost wages is based on the statutory language "amounts deemed to be unpaid minimum wages or unpaid overtime compensation." The language is adopted by reference from the Fair Labor Standards Act. Under that statute, the lower courts have uniformly upheld the right to trial by jury for lost wage claims in cases brought by private individuals.

Both common law actual (e.g., pain and suffering) and punitive damages also appear to be recoverable under the Age Discrimination in Employment Act. Jury trials are clearly available for such claims.

Statutory liquidated damages under the Age Discrimination in Employment Act are recoverable for willful violations. This is a deviation from the provision in the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, authorizing courts in their discretion to decline to award punitive damages, when it is shown to the court's satisfaction that the employer acted reasonably and in good faith. Unlike this discretionary determination, the term willful is appropriate for decision by the jury as factfinder.

B. Because the Act unequivocally allows legal relief, extrinsic aids to construction are inappropriate.

Because the meaning of the Age Discrimination Act is clear and unambiguous in allowing legal relief for violations, it is improper to resort to legislative history and other extrinsic aids to construction. Nevertheless, an examination of the Act's legislative history does not indicate any Congressional intent to make jury trials unavailable, and the one reference in the floor debates to the mode of trial assumes that there will be trial by jury.

C. Title VII is materially different from the Age Discrimination in Employment Act.

Petitioner is wrong in arguing that the Age Discrimination in Employment Act is so similar to Title VII that Title VII cases in the lower courts disallowing jury trials should be followed here. Title VII on its face authorizes only "equitable relief". The legislative history of Title VII clearly shows the intent of Congress not to allow jury trials in cases brought under that statute, except for certain types of criminal contempt proceedings. There are other marked differences between Title VII and the Age Discrimination in Employment Act, contraindications that enforcement procedures under both statutes should be the same; these include the availability of class action under Title VII and not under the Age Act and several significant differences in the handling of complaints filed with the respective administrative agencies.

II. THE SEVENTH AMENDMENT ALSO ENTITLES PARTIES TO AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO A TRIAL BY JURY.

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, since it is a constitutional one, and no similar requirement protects trials by the court.

Treatment of lost wages as incidental to the equitable right of reinstatement

and thereby not amenable to jury trial, is an effort to revive the equity clean-up doctrine. The equity clean-up doctrine has been soundly rejected by decisions of this Court which hold that the right to jury trial on legal claims cannot be lost by the court's determination of equitable issues in the same case.

Cases disallowing jury trials in proceedings before administrative bodies are inappropriate here, because here private rather than public rights are being litigated, the government is not a party to the action, and the case is before a court instead of an administrative agency.

A. The issue is legal rather than equitable under the custom of the courts prior to the merger of law and equity.

Jury trials are claimable for causes of action arising under modern statutes, which deal with issues unknown at common law. The substantive claim in this case is legal, not equitable, analogous to the common law claim for breach of employment contract by wrongful discharge.

B. The remedy sought is legal, not equitable.

The claim for lost wages in this case is for legal relief. Under the Fair

Labor Standards Act provision for recovery of unpaid minimum wages or overtime compensation, adopted by the Age Discrimination in Employment Act, the recovery and computation of the damage award are not discretionary. In accordance with well established principles the punitive and liquidated damage claims made by respondent are not triable in a court of equity, but must be presented to a common law court. While respondent also seeks the equitable remedy of reinstatement, her right to trial by jury on the legal claims for damages are not to be lost by court trial of the common issues of fact.

C. The issue is triable to the jury given their practical abilities and limitations.

The trial of an age discrimination case is well within the practical abilities and limitations of jurors, because the computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained.

* * *

The Court's analysis in this case should be aided by the recent decision of Curtis v. Loether, 415 U.S. 189 (1974),

which held there is a right to trial by jury under the fair housing law, Title VIII of the Civil Rights Act. That statute provides for recovery of actual damages, as well as allowing equitable relief.

The worthy objective of shielding victims of discrimination from juror bias does not overcome the Seventh Amendment right of trial by jury, the Court held in Curtis v. Loether. The same reasoning applies in the present case.

An action for employment age discrimination involves the adjudication of legal rights triable by jury, just as is true of housing discrimination claims.

ARGUMENT

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF ESTABLISHES THE RIGHTS OF LITIGANTS TO TRY THEIR CASES BY JURY.

In the complaint respondent sought "monetary damages" consisting of lost wages from time of discharge to date of judgment and statutory liquidated damages. In her proposed amendment to the complaint, which has been remanded to, but has not yet been decided by, the district court, plaintiff further seeks common law actual damages and common law punitive damages.

A. On its face the Age Discrimination in Employment Act provides for legal relief.

The Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b), (c), provides that the courts shall have jurisdiction in actions brought by private individuals alleging age discrimination "to grant such legal or equitable relief as may be appropriate . . ., including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section;" and again provides that such actions may be maintained in any court of competent jurisdiction for "such legal or equitable relief

as will effectuate the purposes of this chapter." It is also provided that the Age Discrimination in Employment Act shall be enforced in accordance with the "powers, remedies, and procedures" provided in section 216 (and other sections), and any amount owing to a person as a result of age discrimination "shall be deemed to be unpaid minimum wages or unpaid overtime compensation" for the purpose of section 216.

The term "legal relief" cannot be regarded as having no meaning.[3] It is to be assumed, as seems reasonable, that the term "equitable relief" applies to the enumerated remedies of "compelling employment", "reinstatement", and "promotion". The term "legal relief" then would logically apply to the enumerated remedy of "enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." This language clearly refers to the Fair Labor Standards Act, 29 U.S.C. sec. 216(b),

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[3] See e.g., Clark v. Vebersec Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947); Markham v. Cabell, 326 U.S. 404, 410-411 (1945).

incorporated by reference in the above-quoted part of the Age Discrimination in Employment Act. Applying section 216(b), the lower courts have uniformly held that there is a right to jury trial. McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Olearchick v. American Steel Foundries, 73 F.Supp. 273 (W.D.Pa. 1947). When Congress enacted the Age Discrimination in Employment Act and expressly provided that the "procedures" invoked in section 216(b) apply to actions arising under the new statute, it must be assumed that one of those applicable "procedures" intended by Congress was the right to trial by jury so firmly established under section 216(b). Helvering v. Marshall, 303 U.S. 303 (1938). Shapiro v. United States, 335 U.S. 1 (1948).

While liability for amounts deemed unpaid minimum wages or unpaid overtime compensation is the only legal remedy listed, the words "including without limitation" are used to introduce the series. Other forms of legal relief which respondent contends are available under the Age Discrimination in Employment Act include common law actual damages, common law punitive damages, and statutory liquidated damages.

The Age Discrimination in Employment Act is to be regarded as having established a new statutory tort, and once liability under the statute appears, the full panoply of usual tort remedies should be available to compensate injured parties for all provable damages. "[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). Generally, the civil rights laws "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961).[4] It is submitted, therefore, that common law actual damages, such as damages for emotional distress, are recoverable under the Act.

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4 The one case considering this issue and allowing recovery for pain and suffering in an age discrimination case, Rogers v. Exxon Research and Engineering Company, 404 F.Supp. 324 (D.N.J. 1975), was reversed on appeal, 550 F.2d 834 (3rd Cir. 1977).

Under other civil rights statutes lower courts have allowed recoveries for mental distress. Title VII, 42 U.S.C. sec. 2000e: Humphrey v. Southwestern Portland Cement Company, 369 F.Supp. 832 (W.D.Tex. 1973),

Punitive damages have always been recoverable at common law, and where not expressly precluded by a statute permitting legal relief generally, may be recovered under the statute in accordance with common law principles. If the defendant acts willfully and intentionally and in gross disregard of the rights of plaintiff under the statute, punitive damages are recoverable. Lee v. Southern Homes Sites Corporation, 429 F.2d 290 (5th Cir. 1970). On this basis common law punitive damages were held recoverable under the Age Discrimination in Employment Act. Murphy v. American Motors Sales Corp., 410 F.Supp. 1403 (N.D.Ga. 1976).

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4 Continued
rev'd on other gr. 488 F.2d 691 (5th Cir. 1974). Title VIII, 42 U.S.C. sec. 3604, 3612: Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974); Jeanty v. McKey and Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973). The availability of such actual damages is also supported in the literature. Comment, "Implying Punitive Damages in Employment Discrimination Cases," 9 Harv. Civ. Rights - Civ. Lib. L.Rev. 325, 367-369; Duda, "Damages for Mental Suffering in Discrimination Cases," 15 Clev. Mar. L. Rev. 1 (1966).

Statutory liquidated damages in an amount equal to the amounts deemed unpaid minimum wages or overtime compensation, are also specifically recoverable for willful violations, according to section 626(b).[5] Under Section 216(b) as originally enacted, liquidated damages were to be awarded as a matter of course whenever liability for unpaid minimum

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5 In the district court opinion it is stated that respondent has conceded that the liquidated damages issue would not be triable to a jury. (Pet. for Cert. pp. 7a-8a, n. 2). This concession was actually that Chilton v. National Cash Register Company, 370 F.Supp. 660 (S.D.Ohio 1974), the only published decision dealing with the right to a jury trial under the Age Discrimination in Employment Act at the time of the district court's decision, had held that the issue of damages as unpaid wages was for the jury, but that the issue of liquidated damages was not triable by jury. It is not respondent's position that Chilton was correct in withholding the liquidated damage question from the jury.

wages or overtime compensation was established. In 1947, Congress passed the Portal-to-Portal Act, 29 U.S.C. sec. 260, which provided that the court in its sound discretion could decline to award liquidated damages, "if the employer shows to the satisfaction of the court that the act or omission . . . was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . ." The Age Discrimination in Employment Act incorporated by reference the remedies and procedures of sections 211(b), 215, 216, and 217 of the Fair Labor Standards Act, but there was no incorporation either expressly or by implication of section 260 of that act. Congress chose another method to modify the strict liability for liquidated damages under 216 (b), by providing in section 626(b), that liquidated damages are to be awarded only in cases of "willful violations". Thus, the fact finding of the presence or absence of willfullness has been prescribed, instead of the court's being satisfied and exercising its discretion, as a vehicle for avoiding liquidated damages liability. Therefore, liquidated damages are another form of "legal relief" provided for by section 626(b). Cleverly v. Western Electric Company, 69 F.R.D. 348 (W.D.Mo. 1975); Cf, Murphy v. American Motors Sales Corp., supra.

It is axiomatic that when the gist of the prayer for relief is monetary damages, the remedy is legal in nature, and the right of trial by jury attaches. Dairy Queen v. Wood, 369 U.S. 469 (1962). Respondent has identified four types of monetary damages coming within the term "legal relief" expressly invoked by Congress: amounts deemed unpaid minimum wages or overtime compensation, common law actual damages, common law punitive damages, and statutory liquidated damages. Two of these types of legal relief were requested by respondent in her original complaint, and the other two are being sought by the motion to amend the complaint which has been remanded to the district court.

B. Because the Act unequivocally allows legal relief extrinsic aids to construction are inappropriate.

Here then Congress has expressly and unequivocally allowed the recovery of "legal relief" for age discrimination, and respondent has prayed for each right of legal relief that may be regarded as available under the statute. Yet petitioner would seek to deprive respondent of her jury trial right in this case by ignoring the unmistakable language of the statute, and by attempting to divine Congressional intent to make this statute a part of a general federal program against employment

discrimination for which trial by jury is unavailable. This effort is in conflict with universally accepted principles of statutory construction. If the meaning of a statute is clear, the courts are not at liberty to resort to legislative history and other extrinsic aids to construction. United States v. Missouri Pacific Railway Co., 278 U.S. 269, 277 (1929); Ex parte Collett, 337 U.S. 55, 59 (1949); United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820). There must be an uncertainty or ambiguity in the statute to warrant reference to other statutes for the purpose of construing it. Atlantic Coast Line Railway Co. v. Phillips, 332 U.S. 168 (1947). The term "legal remedy" is plain and certain; there is no vagueness or ambiguity which permits recourse to extrinsic aids to construction.

Nevertheless, neither an examination of the legislative history of the Age Discrimination in Employment Act, nor a comparison of this Act with other civil rights laws, is of any benefit to petitioner.

Apparently the only reference in the legislative debates and committee proceedings about the Act that touches upon this issue, is a stated assumption that these cases are triable by a jury. In a discussion on the Senate Floor, Senator Javits said that in an age discrimination case "[a] jury will answer Yes or No." 113 Cong. Rec. 31254

(1967).

C. Title Seven is materially different from the Age Discrimination in Employment Act.

Petitioner argues that the Age Discrimination in Employment Act must be given a construction identical to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, with respect to the availability of trial by jury. In the specification of judicial remedies, however, the two statutes are altogether different. Title VII provides:

> If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

> employment practice), or any other equitable relief as the court deems appropriate. 42 U.S.C. sec. 2000e-5(g). [emphasis supplied].

Another provision of this Act expressly provides for jury trials in certain cases of criminal contempt. 42 U.S.C. sec. 2000h.

Section 2000e-5 on its face provides only for equitable relief. The remedies of reinstatement and award of back pay are to be granted as a part of the court's injunctive decree.

Legislative history supports this interpretation. The report of additional views of House Judiciary Committee member Congressman Meader, took exception to the "growing and . . . alarming tendency in adopting new Federal programs to utilize the sanction of what may be called government by injunction. . . . Such a decree is enforced by contempt proceedings in which there is no right to jury trial, and in case the defendant is found to be in contempt, he is punished by imprisonment at the discretion of the judge. The effect of the employment of this sanction of injunction rather than a civil action at law for the recovery of damages or the institution of criminal proceedings by

indictment or information is that the defendant is shorn of most of the protections set forth in the Bill of Rights of our Constitution." Congressman Meader and other members of the committee were opposed to the judicial remedies created in Title VII, because trial by jury was not made available. United States Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of Civil Rights Act of 1964, pp. 2043, 2046-2050. (Hereinafter cited as "Legislative History").

It was the opposition to the elimination of trial by jury that brought about the compromise Dirksen-Mansfield provision, as altered by the so-called "Talmadge Amendments", allowing jury trials in certain criminal contempt cases. This provision is codified in 42 U.S.C. sec. 2000h. Legislative History, pp. 3379-3382, 3403-3409, 3441, 3467.

In the Senate floor debates it is clear that both the proponents and opponents of Title VII were aware that no jury trial was provided for civil actions to enforce the statute.[6]

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[6] Mr. ERVIN. Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a

Understandably the lower court cases

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6 Continued
day's work for him. The amount of back wages may largely exceed the jurisdictional amount requiring a jury trial in common law cases under the Constitution. Title VII contains no requirement for a jury trial under any circumstances?

Mr. CASE. So far as the act itself is concerned, there is no provision for jury trial. . . .

Mr. ERVIN. No jury trial is provided.

Mr. CASE. No jury trial is provided under the terms of this section.

Mr. ERVIN. With respect to the determination of the original question, that is.

Mr. CASE. No; except, possibly, if the suit were brought by an individual. In that case, I believe it is possible that under the statute a jury trial for criminal contempt might be ordered.

Mr. ERVIN. Inasmuch as this is an injunctive procedure, it would be on the equity side of the docket, and no jury trial would be allowed. Is that not correct?

are in agreement that under Title VII

6 Continued
Mr. CASE. That is a technical matter, varying in each jurisdiction. It would depend on what kind of docket there was in the jurisdiction; whether there were two dockets or whether there were one system. Whether a person would get a jury trial would depend on the system. Only in the matter of criminal contempt would the question arise. The difference between criminal contempt and civil contempt requires a nicety of perception at which the Senator of North Carolina is much better than the Senator of New Jersey.

MR. ERVIN. Does not the Senator from New Jersey agree with the Senator from North Carolina that a suit in which injunctive relief is sought or granted is necessarily an equity proceeding in which there is no right of trial by jury?

Mr. CASE. There is no question about that.

Mr. ERVIN. All of the proceedings under Title VII will be without a jury trial. Is that correct?

Mr. CASE. It will be done without a jury trial in the case of the determination of the fact of the first instance.

there is no right of trial by jury.[7] Because of the abundantly demonstrated legislative intent not to have jury trials under Title VII, and the complete absence of anti-jury motivation on the part of Congress in adopting the Age Discrimination in Employment Act, the Title VII cases rejecting juries are irrelevant here.

While procedures under the Age Act and Title VII bear some similarity (Pet. Br. 7-8), there are also marked differences. Unlike the Age Act, Title VII has no provision for liquidated damages. Class actions are not permitted under the Age Act, La Chapelle v. Owen-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), while class

6 Continued
-- Legislative History, pp. 3295-3296.

7
Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); EEOC v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971) (dictum). This Court took note of courts of appeals decisions holding jury trials inapplicable in Title VII cases but would "express no view on the jury trial issue in that context," in Curtis v. Loether, 415 U.S. 189, 196-197 (1974).

actions are a preferred method of adjudicating Title VII claims, Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971). The Equal Employment Opportunity Commission administers Title VII, while the Age Act is administered by the Department of Labor. Under the Age Act the Department of Labor has a mandatory obligation to attempt to resolve the dispute by informal means, 29 U.S.C. sec. 626(d), but under Title VII the Equal Employment Opportunity Commission has no similar duty, 42 U.S.C. sec. 2000e-5(b). A plaintiff under the Age Act may file his case in court anytime after he has given sixty days notice to the Secretary of Labor of his intention to sue, 29 U.S.C. sec. 626(d), but under Title VII litigation cannot be commenced until a notice of right to sue has been received from the EEOC and then an action must be filed within ninety days following receipt of the notice, 42 U.S.C. sec. 2000e-5(f)(1).

Even without considering the radically different legislative history of the two statutes, the procedures for enforcing claims under them are so disparate that it cannot be maintained any uniform national policy would be served by disallowing jury trials under both statutes. The most crucial difference between these statutes with regard to the jury trial, of course,

is that Title VII on its face is restricted to "equitable relief", whereas the Age Act provides for "legal or equitable relief".

II. THE SEVENTH AMENDMENT ALSO ENTITLES PARTIES TO AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO A TRIAL BY JURY.

In a time of congested court dockets and delays in reaching trials that become almost intolerable, when there is a sense of urgency to streamline our system of justice, the institution of trial by jury has been questioned and criticized in some quarters. In a time when this great institution is being probed for weaknesses, it is well that we be reminded of its strengths: "how in our fallible system of human justice it is the best instrument yet devised for the determination of facts, how even its imperfections operate to rub the rough edges off of technical principles of law when they would result in unjust verdicts, how it is constantly improving with the progress of our jurisprudence and with the advance of education and enlightenment, how it gives the citizen a proud and rightful place in the administration of justice, and tends to make real our utopian dream of a 'government

of the people, by the people, and for the people.'" Those who disagree with the values embraced within our jury system are not free to make their personal philosophies a basis for undermining it through the judicial, or even the legislative, process. They must await an amendment to the Constitution. There "is no occasion for debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases."[8] "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to a citizen . . . should be jealously guarded by the courts." Jacob v. New York, 315 U.S. 752, 753 (1942).

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8 Circuit Judge Rives, concurring and dissenting in Boeing Co. v. Shipman, 411 F.2d 365, 378 (5th Cir. 1969).

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, as Mr. Justice Black has emphasized. "[T]he right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court. . . ." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959).

By contending that lost wages, a part of the monetary relief sought by respondent, is but an adjunct or is incidental to the equitable remedy of reinstatement, petitioner seeks to revive the defunct equity clean-up doctrine. (Pet. Br. 14-15). In Beacon Theatres, Inc. v. Westover, supra, the point was made that the 1938 merger of law and equity and the Rule 38(a), Federal Rules of Civil Procedure, provision that "the right to trial by jury shall be preserved inviolate," had the effect of narrowing equitable jurisdiction and broadening the right to jury trial. Mr. Justice Black concluded that "only under the must imperative circumstances, circumstances which . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost" through the court's determination of equitable issues in the same case. 359 U.S. 510-511. The effect of the holding in that case, where the complaint and counterclaim both alleged anti-trust law violations, and the complaint sought only injunctive relief, but the counterclaim

sought damages as well, was to require the common issues of anti-trust violations to be tried by a jury. An example of how the 1938 merger and Rule 38(a) converted what was formerly an equitable proceeding into an action to which the jury trial right attached is provided by Ross v. Bernhard, 396 U.S. 531 (1970). This was a stockholder derivative suit. Prior to 1938 the suit would have had to be maintained in a court of equity sitting without a jury, because stockholders were not accorded standing in a court of law to seek redress for injuries done to their corporations; but if the corporation itself had sued, a jury trial would have been available prior to 1938. The Court concluded that a determination of whether the case is triable by a jury, must no longer depend on the identity of the plaintiff. It was held that because jury trials had formerly been available in some cases of this nature, the right to trial by jury could now be claimed in all such cases. Where both legal and equitable remedies are sought in the same action, the right of trial by jury will not be submerged. Ross v. Bernhard, supra, 396 U.S. at 537-538 (1970), held that "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the

claims."

The case upon which petitioner strongly relies, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1936), is a pre-merger case which, after Beacon Theatres, Inc. v. Westover, Ross v. Bernhard and Dairy Queen v. Wood, 369 U.S. 469 (1962), can no longer be regarded as controlling for the purpose cited by petitioner. There an order of the National Labor Relations Board which directed reinstatement of unlawfully discharged employees and directed back pay for these employees, was held not to violate the Seventh Amendment. The statement in Jones & Laughlin that the Seventh Amendment is not applicable to cases "where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law," 301 U.S. at 48, has not withstood the test of time. It is an application of the now discredited equity clean-up doctrine. The aspect of the Jones & Laughlin case which has current validity is that there is no right to trial by jury in a proceeding before an administrative tribunal, not in the nature of an action at common law, where public rights are being litigated and the government is suing in its sovereign capacity. Most recently, this doctrine has been relied upon by the Court in determining that civil penalties enforced administratively by the

Occupational Safety and Health Administration, are not subject to the right of trial by jury in Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, 45 U.S.L.W. 4312 (1977). Since actions to recover for violations of the Age Discrimination in Employment Act are committed to litigation by private parties in courts of competent jurisdiction, and not to administrative tribunals, the Jones & Laughlin case is not apposite here.

The modern decisions of this Court have been summarized as requiring that a jury trial be provided if (1) the issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to the jury given their practical abilities and limitations. James, "Right to a Jury Trial in Civil Actions," 72 Yal. L.J. 655 (1963). Each of these points is resolved in favor of the right to trial by jury in the present case.

A. The issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity.

As stated by Justice Story in Parsons v. Bedford, 3 Pet. 433, 447 (1830), the availability of a jury trial depends upon whether legal rights are at issue, not

whether the particular action is derived from one of the common law forms:

> The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law [the framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the Amendment may then well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

Accordingly, this Court has held there is a jury trial right in many causes of action which are based on modern statutes, where the theories, rights, and obligations at issue were unknown to the common law. Dairy Queen, Inc. v. Wood, 369 U.S. 469,

(1962) (trademark laws); Hepner v. United States, 213 U.S. 103 (1909) (immigration laws); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916) (anti-trust laws); Porter v. Warner Holding Co., 328 U.S. 395 (1946) (Emergency Price Control Act); Texas and Pacific R. Co. v. Rigsby, 241 U.S. 33 (1916) (Safety Appliance Act).

The substantive issue in a case under the Age Discrimination in Employment Act is legal, not equitable. A claim of employment discrimination with a prayer for lost wages is analogous to the common law action for breach of contract by wrongful discharge, in which the right of trial by jury obtained. St. Clair v. Local Union No. 515, 422 F.2d 128 (6th Cir. 1969); Ochoa v. American Oil Company, 338 F.Supp. 914 (S.D.Tex. 1972).

B. The remedy sought is legal, not equitable.

The remedies of a legal nature prayed for in the original complaint are for damages consisting of lost wages and for liquidated damages. By the proposed amendment to the complaint, respondent also seeks common law actual damages and common law punitive damages.

Petitioner argues that the wage

loss recovery is restitutionary, and thereby somehow becomes more easily submerged into an equitable remedy. (Pet. Br. 14-17). For a wrongfully discharged employee, like respondent, the recovery is not restitutionary at all. Restitution implies some type of disgorging of unjust enrichment. Because petitioner no longer had the benefit of respondent's services after the wrongful discharge, there could have been no unjust enrichment. See D.B. Dobbs, Remedies, 222-229 (1973). Of the three types of monetary remedies, restitution, reliance and expectation, it is only the last that is relevant in a discriminatory discharge case. For breach of an employment contract, the remedy is clearly in the expectation category: the payment the employee would have received if he or she had not been discharged, less any amount obtained from substitute employment. D.B. Dobbs, supra, at 924-927.

Petitioner further contends that the granting or withholding of damages consisting of lost wages in an age discrimination case is discretionary with the court, and thereby the remedy loses its legal character. (Pet. Br. 14-17, 22). This contention is contradicted by the settled case law under the Fair Labor Standards Act provision, 29 U.S.C. sec. 216(b), incorporated by reference as the source for recoveries in the nature of unpaid minimum

wages and overtime compensation under the Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b). The term unpaid minimum wages and overtime compensation contained in the Age Discrimination Act has been interpreted in a discharge case to mean "the difference between the value of the compensation by way of salary together with other specific monetary benefits, such as increased pension benefits which would have vested prior to trial, to which plaintiff would be entitled had he remained employed by defendant until the trial date and the value of his total benefits and earnings at other jobs from his discharge until the trial date." Monroe v. Penn-Dixie Cement Corporation, 335 F.Supp. 231, 234-235 (N.D.Ga. 1971).[9] It is well established that awards under Section 216(b) are not discretionary; they must be computed with as much precision as possible, based

[9] This statement was cited with approval in Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974). Petitioner improperly cited that case for the statement that relief under Section 626 of the Age Discrimination in Employment Act is within the equitable discretion of the District Court. (Pet. Br. 22) What the Eighth Circuit really said was, "Specific questions

on the evidence adduced. Anderson v. Federal Cartridge Corporation, 62 F.Supp. 775 (D.C.Minn. 1945), aff'd. 156 F.2d 681 (8th Cir. 1945) (to the tenth of a cent per hour); Porter v. Georgia Power and Light Co., 50 F.Supp. 939 (D.C.Ga. 1943); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Mitchell v. Caldwell, 249 F.2d 10 (10th Cir. 1957).

Of course, if actual common law damages are recoverable under respondent's proposed amendment to the complaint, these clearly consist of a legal remedy in the traditional sense.

As petitioner correctly states, "Actions in equity refuse to enforce a penalty and will not award punitive damages." (Pet. Br. 27). Punitive claims, including statutory penalties such as the liquidated damages provided for in the Age Discrimination in Employment Act, and common law punitive damages which are also sought in this case, are elements favorable to trial by jury, in that they are foreign

[9] Continued
concerning damages or other relief are within the equitable discretion of the district court. . . ." 495 F.2d at 373-374.

to equity. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Ross v. Bernhard, 396 U.S. 531 (1970).

These remedies sought in respondent's action make it unmistakably a suit for a money judgment, which is classically a suit at common law to which the jury trial right attaches. Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

The legal nature of the remedies sought here are much easier to perceive than the complex accounting for trademark violation prayed for in Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), which was there held subject to the Seventh Amendment.

While respondent also seeks the equitable remedy of reinstatement, the right to trial by jury arises with respect to the plainly legal claims for damages, and this right is not to be lost by trial of the legal issues incidental to the equitable ones or court trial of the common liability issue. Ross v. Bernhard, supra; Beacon Theatres, Inc. v. Westover, supra; Dairy Queen, Inc. v. Wood, supra.

C. The issue is triable to the jury given their practical abilities and limitations.

The computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained. Monroe v. Penn-Dixie Cement Corporation, 335 F.Supp. 231, 234-235 (N.D.Ga. 1971); Brennan v. Ace Hardware Corporation, 495 F.2d 368, 373 (8th Cir. 1974). Certainly age discrimination cases do not approach the complexity of accounting actions for trademark violations held to be subject to trial by jury in Dairy Queen, Inc. v. Wood.[10]

[10] Prior to the district court's decision of this case, two cases alleging violations of the Age Discrimination in Employment Act had been tried in the Middle District of North Carolina. In both of these cases a jury trial was demanded by the plaintiff, and in both cases the issues were submitted to a jury. These cases are Carroll C. Estes v. Joseph Schlitz Brewing Company, C-267-WS-72 and Anna Rose Duncan Higgins v. Blue Ridge Electric Membership Corporation, C-212-WS-72. Relevant portions of those files are included in the record of the present case.

* * * *

Particularly illuminating to the discussion of whether jury trials are available in discrimination cases is this court's recent decision of Curtis v. Loether, 415 U.S. 189 (1974), where it was held that there is a jury trial right in actions brought under the fair housing law, Title VIII of the Civil Rights Act, 42 U.S.C. sec. 3612.[11]

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10 Continued
The records of these cases indicate no unusual difficulties encountered as a result of submitting the issues to the jury.

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Section 3612 provides:

> The Court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order or other orders, and may award to the plaintiff actual damages and not more than $1,000.00 punitive damages, together with court costs and a reasonable attorney's fee. . . .

Petitioner there argued that the Seventh Amendment is inapplicable to new causes of action created by Congressional enactment. Citing Dairy Queen, Inc. v. Wood, Hepner v. United States, and other cases referred to herein, the Court rejected that argument. "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194.

Like petitioner here, petitioner in that case invoked the authority of National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937). The Court held that, "Jones & Laughlin merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." 415 U.S. at 194.

Unquestionably, the Congressional purpose of making Title VII violations remediable in equitable proceedings, rather than actions at law, was to shield the victims of racial discrimination in

employment from possible racial prejudice by jurors. Comment, "The Right to Jury Trial under Title VII of the Civil Rights Act of 1964," 37 U.Chi.L.Rev. 167 (1969). In Curtis v. Loether, supra, the Court also recognized the possibility of juror prejudice, but held that it could not control the outcome of the decision. "[T]hese considerations are insufficient to overcome the clear command of the Seventh Amendment." The court pointed to the protection against the risk of prejudice afforded by the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict and to grant a new trial. 415 U.S. at 198. Fortunately, in connection with age discrimination cases there is no recognized pervasive prejudice against older workers by the community at large, comparable to the prejudice of potential jurors against minority workers. Among the values generally recognized by our society is a duty of respect and honor to older persons. There is no inconsistency between the Fifth Commandment, Exodus 20:12, and the Seventh Amendment. Thus, the problem of jury prejudice is not a consideration in an action under the Age Discrimination in Employment Act. It should be noted that in the present case it was the employee who

demanded the jury, and the corporate employer which wants to avoid a jury trial.[12]

The Court in Curtis v. Loether concluded that an action for damages under 42 U.S.C. sec. 3612 is an action to enforce "legal rights" within the meaning of the Seventh Amendment cases, including Ross v. Bernhard and Dairy Queen, Inc. v. Wood. Further, the Court found that the statutory cause of action is analogous to a number of tort actions recognized at the common law, such as an action for breach of an innkeeper's duty not to refuse temporary lodging to travelers, and actions to redress defamation and intentional infliction of mental distress. 415 U.S. at 195-196, n. 10.

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[12] In this connection it is observed that the petitioner employer is supported in its efforts to deny respondent a jury trial by the Equal Employment Advisory Council, as amicus curiae. The Equal Employment Advisory Council's members are all employers, and the aim of the organization is to minimize liability of employers under various employment discrimination laws. (Equal Employment Advisory Council Br. 1-2).

Much of the reasoning of the Court in Curtis v. Loether applies equally to the present case. It is submitted that the result should be the same, and respondent should be allowed her right to trial by jury.

CONCLUSION

Bacause both the Age Discrimination in Employment Act itself and the Seventh Amendment require a trial by jury in this case, the decision of the United States Court of Appeals for the Fourth Circuit ought to be affirmed.

Respectfully submitted,

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